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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

LOUIS O'D. LEE,

Petitioner,

against

ST. JOE PAPER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Louis O'D. Lee, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit filed in the above-entitled cause on January 25, 1967.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, reversing the judgment in favor of petitioner in the amount of $182,840, entered in the United States District Court for the Southern District of New York, is reported at 371 F. 2d 797.

The opinion of Hon. Edward C. McLean, U.S.D.J., granting in part petitioner's post-trial motion to add pre-trial interest is unreported. It is printed at pages 428-434a.*

* References preceded by "R" are to the Record, references followed by suffix "a" or "b" are to the printed appendices of respondent and petitioner, respectively, in the Court below.

The opinion of Hon. Edmund L. Palmieri, U.S.D.J., denying respondent's motion for summary judgment is unreported (R1916-21).

The opinion of Hon. Charles M. Metzner, U.S.D.J., granting petitioner's motion to strike the defense of statute of frauds is reported at 197 F. Supp. 229 (S.D.N.Y. 1961).

The opinion of Hon. Frederick Van P. Bryan, U.S.D.J., denying respondent's motion to transfer the venue pursuant to 28 U.S.C. § 1404(a) is unreported (R1230-33).

Jurisdiction to Grant Certiorari

The decision of the Court of Appeals was entered January 25, 1967, and a petition for rehearing was denied on March 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where, as a result of a change in the substantive law of the forum State, the choice of law becomes material and, perhaps dispositive, for the first time after argument in the federal Court of Appeals, does the proper administration of justice require the Court of Appeals to hear argument on and decide the question of which law properly governs?

2. In a diversity action, is a federal court required to determine the constitutionality of the application, to the parties before it, of a state rule of decision, when the question is both substantial and timely?

3. Where a recent change in the substantive law of the forum State abolished the plaintiff's cause of action, should the Court of Appeals have permitted the plaintiff to amend his complaint so as to allege a basis for recovery not affected by the change in forum law?

Constitutional and Statutory Provisions Involved

United States Constitution:

Article I, Section 10, Clause 1:

> "No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts . . ."

Amendment XIV, Section 1, Clause 2:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

Statutes:

Rules of Decision Act, 1 Stats. 92, Sep. 24, 1789, § 34; 28 U.S.C. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

New York Personal Property Law § 31 (10), L. 1949, c. 203, eff. Sep. 1, 1949; repealed and recodified *in haec verba* as General Obligations Law § 5-701(10), L. 1963, c. 576, eff. Sep. 27, 1964; as amended by L. 1964, ch. 561, enacted April 16, 1964, eff. Sep. 27, 1964. To avoid needless repetition, the statute is printed below as it now stands. Matter in italics was added by L. 1964, ch. 561, eff. Sep. 27, 1964.

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged

therewith, or by his lawful agent, if such agreement, promise or undertaking;

"10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. *'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.* This provision *shall apply to a contract implied in fact or in law to pay reasonable compensation but* shall not apply to a contract to pay compensation to an auctioneer, an attorney at law or a duly licensed real estate broker or real estate salesman."

Statement of the Case

The facts are set forth in the opinion of the Court of Appeals, 371 F. 2d 797-99 (2 Cir. 1967). In August 1956, petitioner, an industrial and management consultant in the paper and pulp industry (3a), suggested to Edward Ball, chief executive officer of the respondent, a Florida corporation, that respondent might benefit materially from the acquisition of National Board & Paper Mills, Ltd., an Irish paper-making company located in Waterford, Ireland (5-6a; 1-3b; R245-251). Ball said he was interested and instructed petitioner to obtain more technical and financial information (7a; 3b), which petitioner proceeded to do over the next few months by means of trans-atlantic telephone, cable and correspondence with Mr. Williamson, National's Managing Director (Exs. 2-16; 435-466a), keeping Ball abreast of developments (R41-44, 331, 665, 820; Exs. 17-20; 467-471a).

After several changes in plans, not material here, petitioner and Ball departed for Ireland on October 11, 1957 (10-12a), inspecting the mill at Waterford on October 18th (R65-70); meeting with National's directors in County Galway on the 22nd, and on the 30th in Dublin with Dr. J. P. Beddy, Chairman of Industrial Credit Company, the owner with another Irish company of all of National's stock (R74-114). This last meeting resulted in Dr. Beddy's giving respondent a ninety day option, dated November 6, 1957, to purchase all the stock of National (Ex. 38; 494a).

Later in November, 1957, petitioner met with Ball in Florida where they discussed and disagreed on the amount petitioner was to be paid if the purchase was consummated (23-26a; R116-129, 416, 455). From that time on petitioner was *persona non grata* to respondent, was not invited to participate in any further negotiations (R803), and was denied any further information about subsequent developments (505-506a).

During the early part of 1958 Dr. Beddy came to Florida where he and representatives of respondent drew up an agreement which was signed in Dublin on May 8, 1958 (Ex. 47; 507a). This agreement, as amended, provided for the respondent's acquisition of all of the outstanding stock (other than qualifying shares) and capital debt of National for $2,708,196. Although framed in the terms of an option (expiring August 8, 1963 and later extended to August 8, 1966), it was in all essential respects an installment purchase contract. The respondent was required to pay the owners £100,000 ($280,000) annually, the amount so paid to be applied against the purchase price in the event the option was exercised, otherwise to be forfeited. Complete control and management of National's affairs was turned over to respondent from the outset and has been exercised by it ever since under the direction of Ball, who became Chairman of the Board. At the time of the trial respondent had paid an aggregate of approximately $2,240,000 to

the stockholders in annual installments (all of which would be forfeited if the option were not exercised) and *in addition* had advanced to National, by way of direct and guaranteed loans, funds aggregating approximately $4,500,000 making its total investment $6,740,000 (310-311a).

Proceedings Below

The present action, seeking to recover the reasonable value of petitioner's services in the amount of $175,000, was commenced in Supreme Court, New York County, on December 2, 1960, and was duly removed to the District Court, Southern District of New York, on the grounds of diversity, the petitioner being a citizen of New York and the respondent being a Florida corporation. The action was tried in November 1965, and on the 19th of that month a jury returned a verdict in favor of petitioner in the amount of $140,000, to which the trial judge added $42,840 pre-judgment interest pursuant to New York Civil Practice Law & Rules 5001. Judgment in favor of petitioner was entered on January 6, 1966, in the amount of $182,840. Both parties duly appealed to the United States Court of Appeals, respondent from the judgment and from the denial of several post-trial motions; and petitioner because the trial judge had computed pre-judgment interest improperly.

In the Court of Appeals respondent moved on two occasions to stay further proceedings in that Court pending the outcome of a litigation in the state courts which respondent maintained would dispose of the present action. The state litigation involved the question of whether the 1964 amendment to subdivision 10 of General Obligations Law § 5-701, by "clarifying" prior law, barred an action by a finder or business broker, respondent maintaining that it did and that it would preclude the maintenance of the present action. On June 29, 1965, the Special Term had

held that the 1964 amendment was not merely a clarification of prior law, and that the statute of frauds as it stood prior to the amendment did not apply to an action in *quantum meruit*. *Minichiello* v. *Royal Business Funds Corp.*, 47 Misc. 2d 310, 262 N.Y.S. 2d 708 (Sup. N. Y. 1965). On February 3, 1966, the Appellate Division affirmed, 25 A. D. 2d 502, 266 N.Y.S. 2d 570, Justice Steuer dissenting; and on May 5, 1966, that Court granted leave to appeal to the Court of Appeals, 25 A. D. 2d 957. The Court below twice denied respondent's motions to stay proceedings, and the appeal herein was argued on October 20, 1966. On December 30, 1966, the New York Court of Appeals unanimously reversed the Appellate Division's decision in *Minichiello*, 18 N. Y. 2d 521, 277 N.Y.S. 2d 268, 223 N. E. 2d 793, and on January 25, 1967, the Court below unanimously reversed the judgment of the District Court herein, because it deemed itself bound by *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941), to follow *Minichiello*.

The petitioner herein duly asked the Court below to grant rehearing, challenging the constitutionality of the application of *Minichiello* to this petitioner; urging that petitioner be allowed to show that the state courts would have applied foreign law to the transaction herein; and, if overruled, requesting leave to amend his complaint to assert claims not barred by the New York Statute of Frauds. Rehearing was denied without opinion by the United States Court of Appeals on March 3, 1967. That Court has twice stayed its mandate to the District Court so as to enable the petitioner herein to ask this Court for certiorari.

Reasons for Granting the Writ

1. The decision of the Court below is in direct conflict with this Court's decision in *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), and like cases, because the Court of Appeals applied the internal law of New York without

determining whether the New York courts would have done so, or would have applied foreign law.

2. The proper administration of justice requires the lower federal courts, and particularly the courts of appeals, to decide seasonable and substantial constitutional challenges to state rules of decision as they are applied to the parties in a diversity action, so that on certiorari this Court will have the benefit of the lower court's opinion and reasoning.

3. The proper application of Rule 15(b) of the Federal Rules of Civil Procedure requires that after a reversal of a judgment because of an intervening change in the governing law, a party be entitled to amend his pleadings to assert a claim or defense which survives the change in the law.

ARGUMENT

I

The Court below improperly applied the internal law of New York without determining what law the New York courts would have applied.

The Court below reversed the judgment in favor of the petitioner solely on the authority of *Minichiello* v. *Royal Business Funds Corp.*, 18 N. Y. 2d 521, 277 N.Y.S. 2d 268, 223 N. E. 2d 793 (1966), decided after the argument of the appeal below. The reasoning of the Court below was that "in *Minichiello* the New York Court of Appeals was faced with a similar situation to the one we are faced with here," 371 F. 2d 797, 799, and it therefore applied to the present case the New York Statute of Frauds, General Obligations Law, § 5-701(10), as it had been construed in *Minichiello*.

Until the New York Court of Appeals had ruled in *Minichiello*, the choice of law had been immaterial to the outcome of the instant litigation. Under the laws and decisions of the three jurisdictions having contact with the transactions in suit—Ireland, Florida and New York—the statute of frauds would not have barred an action in *quantum meruit* for services rendered by a business broker or finder. *Gibson* v. *Archer Productions, Inc.*, 281 App. Div. 661, 117 N.Y.S. 2d 438 (1st Dept. 1952), following *Harmon* v. *Alfred Peats Co.*, 243 N. Y. 473, 154 N. E. 314 (1926); *Bucki & Son* v. *McKinnon*, 37 Fla. 391, 20 So. 540, 541 (1896); *Miller* v. *Greene*, 104 So. 2d 457, 462 (Fla. 1958); *O'Connell* v. *Listowel Urban Distr. Council*, [1957] 23 Ir. Jur. 43. This being so, the choice of the governing law as to the statute of frauds has never been fully briefed or argued in either of the courts below.*

The *Minichiello* decision changed all this. For the first time there was a divergence between the laws of the three potentially governing jurisdictions, and this divergence made the choice of law both material and critical. If the defense of statute of frauds were to be determined under the law of the forum, respondent would perforce prevail. If the defense were measured by the law of Ireland or Florida, the judgment of the District Court on that point must be affirmed.

On the petition for rehearing in the Court below, which was petitioner's first opportunity to raise the question

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* Where the choice of law is immaterial to the outcome of an action, the federal courts are not required to make gratuitous decisions on conflicts of laws questions. Thus the Third Circuit said in Consolidated Fisheries Co. *v.* Fairbanks, Morse & Co., 193 F. 2d 957, 958 (3 Cir. 1952):

> "Since this decision rests on elementary principles of contract interpretation and the result would in no way be affected by the choice of law, it is unnecessary for us to decide which law a Pennsylvania court would apply."

after it had become material, petitioner asked the Court to allow argument that the New York courts would not have applied the New York statute to the transaction in suit. The Court of Appeals denied rehearing without opinion.

a. The Court below failed to decide what law the New York courts would have applied to the facts of the present case.

This Court has held that the rule of *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1938), requires the federal courts in diversity cases to apply not merely the internal law of the forum state, but also its conflicts of law rules. *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941). In *Klaxon* and in *Griffin* v. *McCoach*, 313 U. S. 498 (1941), this Court reversed judgments of lower federal courts which had applied foreign substantive law without first determining whether the courts of the forum State would have done so. In *First National Bank* v. *United Air Lines*, 342 U. S. 396 (1952), this Court reversed the judgment of the Seventh Circuit for applying a statute of the forum State, which this Court held to deny full faith and credit to the internal law of a sister State by which the rights of the parties were properly to be governed. *Cf.*, *Sutton* v. *Leib*, 342 U. S. 402 (1952). Thus, in refusing to consider what internal law the New York courts would have applied to the transaction in suit, the Court below violated the command of the *Klaxon, Griffin and First National Bank* cases, *supra*. The correct choice of law is not, of course, for this Court to make. That choice should be made by the Court of Appeals on remand, *cf.*, *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 205, 209, 212 (1956), and should have been made by that Court on the petition for rehearing.

b. The New York courts would not have applied the forum statute of frauds on the facts of the present case.

The Court below erred in characterizing *Minichiello* as a "similar situation to the one we are faced with here." In *Minichiello* there had been no contact with any jurisdiction other than New York. All of the parties were New York citizens or corporations, and all the incidents of the various transactions there took place in New York. Here, on the other hand, the New York contacts were insignificant. The only New York contacts, apart from petitioner's being a New York citizen, were that petitioner sent and received correspondence and telephone calls from that State, and he also had a few conversations with Mr. Ball while the latter was in New York on other business. Under oath Mr. Ball characterized these conversations as "of casual and passing nature" (R. 1220). Petitioner also had some contacts with respondent in Florida. However, the greater part of petitioner's services to respondent, by far, was physically performed by petitioner in the Republic of Ireland, when petitioner accompanied Mr. Ball there, performed introductions to the directors of National, and attended various conferences and inspection tours in that country.

The New York Statute of Frauds does not apply to every contract within its coverage merely because action on such contract is brought in that State. In *A. S. Rampell, Inc.* v. *Hyster Co.*, 3 N. Y. 2d 369, 382, 165 N.Y.S. 2d 475, 486-87, 144 N. E. 2d 371, 380-81 (1957), the New York Court of Appeals held that the statute of frauds was not a defense to an action arising out of the oral modification of a written contract governed by the law of Oregon, where that State permitted such modifications. Similarly, in *Lindeman* v. *Textron, Inc.*, 229 F. 2d 273, 276 (2 Cir. 1956), the Court of Appeals held that subdivision 10 of the statute of frauds would not apply to an action brought in New York where the crucial events had occurred in jurisdictions other than

New York.* *Cf., Perrin* v. *Perlstein,* 314 F. 2d 863, 866-67 (2 Cir. 1963). Accordingly, the Court below should have heard reargument to determine whether or not the New York courts would have applied the New York statute on the facts of the present case.

c. Petitioner did not waive his right to have the proper law applied, and no prejudice will result if it be applied.

Petitioner has been the victim of bad timing in that *Minichiello* was decided after the present case had been argued in the Court of Appeals. Had *Minichiello* been decided prior to the filing of briefs and argument in the Court below, petitioner would not have been foreclosed from arguing that the judgment of the District Court in his favor must be affirmed under the proper law because a court of appeals "may affirm a judgment upon grounds not urged in the lower court, . . . [although it] may not reverse one upon such a ground." *Palmer* v. *Reconstruction Finance Corp.,* 164 F. 2d 466, 468 (2 Cir. 1947); *cf., United States* v. *Raines,* 362 U. S. 17, 27 nt. 7 (1960). Of course, in the

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* The decision in the *Rampell* case had been foreshadowed in Rubin *v.* Irving Trust Co., 305 N. Y. 288, 300, 113 N. E. 2d 424, 428 (1953). There the Court held that because of New York's strong public policy against oral modification of wills, it would apply the New York statute to deny enforcement to an oral contract to bequeath property, made by a New York testator in Florida where such contracts were valid. But the Court indicated that its holding would not apply to mere commercial transactions. *Loc. cit.* Judge Desmond's suggestion that the New York statute be applied to any contract sought to be enforced in the State regardless of its validity by the *lex locus contractus,* 305 N. Y. at 307, 113 N. E. 2d at 432, was not adopted by the Court.

The only discernible New York policy in connection with subdivision 10 is the protection of New York businessmen from unfounded claims of brokers and finders. Leg. Doc. (1949) No. 65(G), p. 615. There would seem to be no compelling reason to extend the protection of New York's policy to a Florida corporation if Florida itself has not seen it necessary to provide its citizens with such protection. That the claim herein is well founded is amply attested to both by the verdict and the record.

Court below the petitioner was the appellee, seeking an affirmance of a substantial judgment in his favor. But the timing of *Minichiello* restricted petitioner to seeking the discretionary remedy of a petition for rehearing, which the Court of Appeals refused to grant, without opinion.

Klaxon v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), *supra*, and like cases strongly suggest that a litigant in the federal courts is entitled as of right to have the proper law applied where the determination of that law is material and perhaps dispositive of the action. *Cf.*, *Pecheur Lozenge Co., Inc.* v. *National Candy Co., Inc.*, 315 U. S. 666 (1942). In *Parkway Baking Co., Inc.* v. *Freihofer Baking Co., Inc.*, 255 F. 2d 641, 646 (3 Cir. 1958), the Third Circuit construed the *Pecheur* case and *Lamar* v. *Micou*, 114 U. S. 218, 223 (1885), as conferring an absolute right to the proper choice of the governing law:

> "'Neither the failure of National to raise the issue of Illinois law below, nor its lack of compliance with the Pennsylvania Judicial Notice Act can bar our application of Illinois law on this appeal. . . . *And National cannot be considered to have waived its right to have the contract interpreted under the proper law by failing to raise the question in the District Court.* . . . It is clear, therefore, that the law of Illinois governs the interpretation of this contract." (Italics added.)

Accord, United States v. *Latrobe Constr. Co.*, 246 F. 2d 357, 361 (8 Cir. 1957); *Schultz* v. *Tecumseh Products*, 310 F. 2d 426, 433 (6 Cir. 1962).* The holding of the *Parkway Baking* case, *supra*, would seem particularly apt in situations where a state court would be obliged to give full faith and credit

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* Although some cases appear to hold that the application of a different law in the appellate court is purely discretionary with that court, see *e.g.*, Jannenga *v.* Nationwide Life Ins. Co., 288 F. 2d 169, 172 (App. D. C. 1962) (and cases cited therein), such cases generally involve situations in which applying such new law would require a new trial.

to a sister-state's law, for a federal court can no more deny full faith and credit to the proper law than can a state court. *Compare, First National Bank* v. *United Air Lines,* 342 U. S. 396 (1952), with *Hughes* v. *Fetter,* 341 U. S. 609 (1951).

Since the case had been tried on the theory that the statute of frauds was not a defense to the action, the application of the law of a jurisdiction in which it is not a defense can not alter the result of the trial and will not prejudice the respondent.

In the circumstances, the Court below should not have treated the petition for rehearing as an application for an act of grace, which rehearing normally is, but should have heard reargument on the choice of law as part of its constitutional duty to decide cases and controversies properly before it. Its failure to do so requires that the judgment below be vacated.

II

The Court below improperly deprived petitioner of a hearing on the merits on a substantial and timely challenge to the constitutionality, as applied to petitioner, of the state rule of decision.

Just as the decision of *Minichiello* for the first time raised a choice of law question after the argument in the Court below, so also did that decision for the first time create a question as to the constitutionality of applying to this petitioner the rule enunciated by the New York Court of Appeals.* On the petition for rehearing in the Court below,

* In opposing respondent's motion to extend its time to file briefs in the Court below until after decision in *Minichiello,* counsel for petitioner ventured (affd. R. L. Duff, sworn to May 27, 1966, pp. 5-8) that a reversal by the Court of Appeals in *Minichiello* would violate the Constitution. However, these papers presumably were not before the Court below when it reversed the judgment of the District Court.

petitioner urged the Court to allow rehearing and argument because (pp. 5-6):

> "If the effect of *Minichiello* is in fact to impair the obligations of contracts performed prior to the 1964 amendment, then this Court can not properly regard *Minichiello* as controlling here. The only state law which may be applied by the federal courts in diversity cases under *Erie* v. *Tompkins*, 304 U. S. 64 (1938), is constitutional state law. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 547 (1949). This Court, therefore, has an obligation to make an independent determination as to whether *Minichiello* accords with the Constitution."

By denying the petition for rehearing below, the Court of Appeals foreclosed petitioner from a hearing as of right, since this Court may deny certiorari for reasons unrelated to the merit of a petition.

To say that in a diversity case the federal court may apply only constitutional state laws is to state a truism. It follows not only from the Rules of Decision Act, 28 U.S.C. § 1652, itself, but also from the Supremacy Clause of the Constitution, Art. VI, § 2. As this Court said in *Hurd* v. *Hodge*, 334 U. S. 24, 35-36 (1948) (a non-diversity case):

> "We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States."

Again, in *First National Bank* v. *United Air Lines*, *supra*, 342 U. S. 396 (1952), by reversing the judgment of dismissal entered on authority of an Illinois statute which forbade enforcement of out-of-state wrongful death actions, this Court demonstrated the utter incapacity of a federal court to apply an unconstitutional state statute as the rule of decision in a diversity case.

Since it is also a maxim of constitutional law that no federal court will declare a state statute or judicial rule of decision unconstitutional where there is another avenue to decision, *Clay* v. *Sun Insurance Office*, 363 U. S. 207, 211 (1960), and since the constitutional question herein is not reached until the choice of law issue is decided, we do not *on this petition* ask this Court to declare the New York rule unconstitutional, and do not therefore set forth the grounds why we believe its application to this petitioner would violate the Contracts Clause, Art. I, § 10, and the Due Process Clause of the Fourteenth Amendment.*

However, petitioner respectfully submits that the orderly administration of justice requires that the federal courts should decide even constitutional questions when these are both substantial and timely, and can not be avoided. Since both the conflicts question and the constitutional question herein arose after the argument below, we believe the Court of Appeals was duty bound to grant rehearing. The decision below, as it now appears, is a decision only of a part of a case. The result of the piecemeal decision below is that petitioner's judgment for $182,840 has been reversed on authority of a statute which may well be inapplicable or, if applicable, unconstitutional as applied. More than just losing his judgment, petitioner is faced upon the remand of this case to the District Court with a judgment for costs against him which counsel is informed may exceed $17,000.

The lack of a decision below on the choice of law and the constitutionality of the application of *Minichiello* to

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* The constitutional argument is set forth in some detail in the petition filed to review the decision in Minichiello *v.* Royal Business Funds Corp. If this Court grants certiorari in that case and either affirms or reverses the judgment of the New York Court of Appeals therein, the constitutional question herein may vanish. Nevertheless, certiorari should be granted herein and the decision below vacated or reversed and the cause remanded for decision of the other questions which the Court of Appeals never reached, including respondent's assignments of error.

this petitioner, means that those questions are before this Court *nisi prius*. This Court, therefore has no guide as to the substantiality of the petitioner's contentions. There is no opinion in the Court below bearing upon the questions involved. To make any kind of case in this Court the petitioner must in effect write a brief on the merits since there is no holding below on which he may comment briefly, and no rationale which he may refute. Such is not properly the office of a petition for certiorari. This petitioner has been spared the laborious documentation of the constitutional argument itself because the *Minichiello* petition has done that, and repetition is unwarranted herein.* But this Court is entitled to have the question considered below. *Cf., Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 209 (1956) (Frankfurter, J., concurring); *id.*, at 212 (Harlan, J., dissenting).

The Court of Appeals' refusal to grant rehearing on the important questions raised on the petition below, therefore, was an abuse of its discretion, and the judgment below should be reversed or vacated and the cause remanded to that Court for decision of the two questions made material for the first time by the New York Court of Appeals' decision in *Minichiello*.

III

The Court below abused its discretion in refusing to grant petitioner's motion for leave to amend the pleadings so as to assert a claim not barred by the New York Statute of Frauds.

Had the Court of Appeals granted rehearing and then determined (1) that as a matter of choice of law the forum statute of frauds applied, and (2) that such application to petitioner did not involve an unconstitutional

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* Copies of the *Minichiello* petition have been furnished to the attorneys for the respondent herein.

impairment of the obligations of contract, the Court below should have allowed amendment of the petitioner's pleadings in the interests of justice. Rule 15(b) of the Federal Rules of Civil Procedure directs that leave to amend shall be freely given when justice so requires. *Cf., Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 158 (1964); *Foman* v. *Davis*, 371 U. S. 178 (1962). A recent change or clarification of the controlling decisional law is recognized as ample justification for amendment, even after trial and appeal. *Rogers* v. *White Metal Rolling & Stamping Corp.*, 249 F. 2d 262 (2 Cir. 1957); *Emich Motor Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7 Cir. 1956).

The Record in this case demonstrates the merit of petitioner's claim for compensation for his services in the transaction, quite apart from services rendered as a finder or broker (which are the only services proscribed by subdivision 10 of General Obligations Law § 5-701). The respondent has itself admitted as much in its reply brief in the Court below, where it stated (pp. 6-7):

> "The conclusion is inescapable that, the idea having already been disclosed, *the intention of the parties was that plaintiff was to aid and assist in the transaction, and be compensated for his 'time and expense incurred'.* This is exactly what plaintiff himself testified, and further strong evidence of this was that it had previously been done this way between the parties. *Defendant has never denied that plaintiff was entitled to some compensation for his services,* only that he was entitled to a large portion of the purchase price and a stock participation as an ordinary commercial finder or broker. *The intention of the parties* • • • *was that the compensation was to be determined, as it had previously been done, for the amount of effort and expense involved.* This is why defendant offered to pay the expense of the Irish trip (83a), and why plaintiff said he was 'willing to assume • • • the expense • • • [and] expected this would be taken into

consideration in the final compensation.' * * * Plaintiff knew he would be reimbursed on the basis of their past dealings. *This further evidences that this was no ordinary commercial hiring, but a special sort of relationship* * * *" (Italics added).

Had the Court of Appeals granted rehearing, therefore, and ruled against petitioner on the choice of law and on constitutionality, it should in the interests of justice, have remanded to the District Court with instructions to the District Court to give petitioner leave to amend his complaint in order to assert claims which survived the change of law.

CONCLUSION

The decision of the Court of Appeals, reversing the judgment of the District Court in favor of petitioner, should be vacated or reversed, and the cause remanded to the Court of Appeals with instructions

(a) To determine what law the courts of New York would have applied to the facts of the present case;

(b) To determine whether, if the New York courts would have applied the New York statute of frauds, as construed, to this petitioner, they could have done so constitutionally, and if so

(c) To permit amendment of the complaint to allege a claim which is not affected by the change in law.

Respectfully submitted,

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